

**TA SECURITIES HOLDINGS BHD & ANOR v.
KETUA PENGARAH INSOLVENSI & ORS**

HIGH COURT MALAYA, KUALA LUMPUR

MARIANA YAHYA J

[JUDICIAL REVIEW NO: WA-25-195-8-2018]

15 MARCH 2020

BANKRUPTCY: Discharge – Order of – Application for certiorari to quash DGI's decision in discharging deceased bankrupt – Whether DGI's decision invalidated findings of courts directing him to conduct further investigations into bankrupt's assets – Whether DGI had jurisdiction under s. 33A of Insolvency Act 1967 to reverse courts' decision – Whether there were asset discovery proceedings ongoing prior to DGI's decision – Whether DGI had duty to properly and thoroughly investigate affairs of bankrupt in any application for discharge of bankruptcy – Whether mere fact bankrupt is deceased allowed for automatic discharge under s. 33A read together with s. 33B(2A)(e) – Whether DGI acted illegally and irrationally – Whether there was procedural impropriety in DGI's decision to discharge bankrupt

ADMINISTRATIVE LAW: Judicial review – Application for – Application for certiorari to quash DGI's decision in discharging deceased bankrupt – Whether applicants barred from filing application due to availability of alternative/statutory remedy against DGI's decision vide s. 86 of Insolvency Act 1967 – Maxim of *generalia specialibus non derogant* – Whether applicable – Whether filing of appeal against DGI's decision under s. 86 inherently contradictory to s. 33B – Whether availability of alternative remedy a bar to judicial review – Whether applicants succeeded in demonstrating illegality or unlawful treatment in DGI's decision

ADMINISTRATIVE LAW: Judicial review – Application for – Discharge of bankruptcy – Order of – Application for certiorari to quash DGI's decision in discharging deceased bankrupt – Whether DGI's decision invalidated findings of courts directing him to conduct further investigations into bankrupt's assets – Whether DGI had jurisdiction under s. 33A of Insolvency Act 1967 to reverse courts' decision – Whether there were asset discovery proceedings ongoing prior to DGI's decision – Whether DGI had duty to properly and thoroughly investigate affairs of bankrupt in any application for discharge of bankruptcy – Whether mere fact bankrupt is deceased allowed for automatic discharge under s. 33A read together with s. 33B(2A)(e) – Whether DGI acted illegally and irrationally – Whether there was procedural impropriety in DGI's decision to discharge bankrupt

This was the applicant's application for judicial review which sought, *inter alia*, for an order for *certiorari* to quash the first respondent's decision ('the DGI decision') in discharging the deceased bankrupt, LTK. The applicants were amongst the 13 creditors who filed their proof of debts against LTK. The first respondent conducted a public examination of LTK based on his statement of affairs. Subsequently, LTK filed an application ('first discharge application') for an order for discharge pursuant to s. 33 of

- A the Insolvency Act 1967 ('the Act') which was filed approximately ten years after he was adjudged bankrupt. The High Court, in dismissing the first discharge application, found that there was no proper investigation done on the conduct and affairs of LTK based on the first respondent's report. LTK passed away soon after, prior to the appeal to the Court of Appeal. The Court of Appeal allowed LTK's younger brother LCW to carry on the appeal in place of LTK. LTK then appealed to the Court of Appeal. The Court of Appeal upheld the decision of the High Court and the Federal Court dismissed LTK's application for leave to appeal. Therefore, the findings and decisions of the High Court, Court of Appeal and Federal Court remained valid and binding. However, despite the clear findings by the court admonishing the first respondent's efforts in investigating the assets of LTK, the first respondent failed and/or refused to take any further steps to investigate the affairs of LTK. The applicants accordingly had reasons to suspect that LTK had further assets which had not been disclosed to or investigated by the first respondent. Premised on the foregoing and given the inaction by the first respondent, the applicants filed several *ex parte* applications under r. 53 of the Bankruptcy Rules 1969 and s. 31 of the Act to administer interrogatories and/or obtain discovery of documents against the examinees who would likely have information regarding LTK's undisclosed assets. The said proceedings have yet to be fully and finally disposed of and were currently pending determination. The applicants claimed that the first respondent was fully aware of all the above asset discovery proceedings but despite it, the applicants received the DGI decision *vide* a letter notifying that the first respondent had exercised his discretion to allow a discharge of bankruptcy *vide* the certificate of Director General of Insolvency pursuant to s. 33A of the Act. Aggrieved, the applicants filed this present judicial review application to challenge the said DGI decision, *inter alia*, on grounds that the first respondent had acted irrationally, unreasonably, disproportionately, in breach of natural justice and procedural fairness in abusing his discretion by taking into account irrelevant considerations in invoking s. 33A of the Act and consequently applying s. 33B(2A) of the Act in preventing the applicants from objecting to LTK's discharge from bankruptcy. The first and second respondents, however, opposed this judicial review application and submitted that (i) the applicants were barred from filing the application because of the availability of an alternative/statutory remedy against the DGI decision *vide* s. 86 of the Act; and (ii) the DGI decision was in accordance to proper procedure.

Held (allowing application with costs):

- I (1) Section 33B is a specific provision applicable to challenge the first respondent's decision whereas s. 86 is a residual position and as the general provision, is not applicable as far as s. 33B is concerned. The maxim of *generalia specialibus non derogant* is applicable. Section 33B(2A)(c) specifically bars creditors from objecting to the DGI decision discharging a bankrupt who is deceased. By filing an appeal

against the DGI decision under s. 86 is inherently contradictory to s. 33B. The availability of an alternative remedy is not a bar to judicial review provided that the applicants are able to demonstrate illegality or unlawful treatment in the DGI decision. In such circumstances, it would be wrong to insist on exhaustion of an alternative remedy. (paras 23 & 24)

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- (2) Both the High Court and the Court of Appeal had concluded that the first respondent should conduct further and more thorough investigations into the assets of LTK before a discharge could be considered. Despite not having conducted any further investigations into the matter, the first respondent continuously sought to reconsider and discharge LTK pursuant to s. 33A read together with s. 33B(2A) of the Act as LTK was deceased. In light of, *inter alia*, the asset discovery proceedings and the courts' decision in the first discharge application, the first respondent had proceeded to make the DGI decision. After the commencement of the judicial review proceedings, the first respondent then sought to suspend his decision because of the existence of the asset discovery proceedings. The first respondent by his language acknowledged that decision had been made and that he was now delaying the implementation of the discharge. The DGI decision and the first respondent's subsequent reasons for suspending the decision plainly defied logic and was an afterthought as the first respondent was well aware of the asset discovery proceedings prior to making the DGI decision. (paras 25-27)

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- (3) The first respondent's position that LTK was now deceased did not warrant a reconsideration of the discharge given this factor was expressly considered by the Court of Appeal in their grounds of judgment. The first respondent had no power and/or jurisdiction under s. 33A to reverse a court's decision when discharging a bankrupt namely LTK and subsequently suspend the said decision. The conduct of the first respondent was irrational as in effect, by unilaterally discharging LTK, the first respondent invalidated the findings of the High Court and Court of Appeal directing the first respondent to conduct further investigations into the assets of LTK. It is trite that the DGI has the duty to properly and thoroughly investigate the conduct and affairs of a bankrupt in any application for a discharge of bankruptcy. Therefore, it would be wrong for the first respondent to use s. 33B(2A)(e) as an excuse to discharge LTK without complying with the court's order. (paras 28-31)

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- (4) The mere fact that a bankrupt is deceased does not allow for an automatic discharge under s. 33A read together with s. 33B(2A)(e) of the Act because such position is not provided for under s. 33C of the Act which sets out the positions on automatic discharge. Therefore, it still fell within s. 33A requiring the first respondent to still exercise his

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- A discretion in taking into account all relevant considerations. Most pertinently, s. 33A does not empower the first respondent to reconsider applications that had already been determined by the High Court *vide* an application under s. 33 of the Act. Therefore, the first respondent had acted illegally, irrationally and there was procedural impropriety in the
- B DGI decision to discharge LTK under s. 33A of the Act. (paras 32-33)

Case(s) referred to:

- Lim Hun Swee v. Malaysia British Assurance Bhd & Ors And Others Appeals* [2010] 8 CLJ 680 CA (*refd*)
- C *Menteri Dalam Negeri & Ors v. Titular Roman Catholic Archbishop Of Kuala Lumpur* [2013] 8 CLJ 890 CA (*refd*)
- Metacorp Development v. Ketua Pengarah Hasil Dalam Negeri* [2011] 1 LNS 1002 HC (*refd*)
- R Rama Chandran v. Industrial Court Of Malaysia & Anor* [1997] 1 CLJ 147 FC (*refd*)

Legislation referred to:

- D Bankruptcy Rules 1969, r. 53
- Federal Constitution, arts. 5, 8, 10, 13
- Insolvency Act 1967, ss. 16(2)(b), 31, 33, 33A, 33B(2A)(c), (e), 33C, 35(4), 86
- Insolvency Rules 2017, r. 194

For the applicants - Daniel Albert & Kenneth Hiew; M/s Daniel & Wong

- E *For the 1st & 2nd respondents - Istisyhad Ismail; FC*

Reported by Suhainah Wahiduddin

JUDGMENT

- F **Mariana Yahya J:**

Introduction

- [1] This is the applicants' application for judicial review which seeks *inter alia* for the followings:
- G (i) An order for *certiorari* to quash the first respondent's decision dated 18 May 2018 (the DGI decision) in discharging the deceased bankrupt, Lim Tee Keong (LTK) (NRIC: 491012-10-5475/2148359) by certificate of Director General of Insolvency under s. 33A of the Insolvency Act 1967 (the Act) which is read together with s. 33B(2A) of the Act.
- H (ii) Further and/or in the alternative, a declaration that s. 33B(2A) of the Act is null and void as it is in conflict with arts. 5 and/or 8 and/or 10 and/or 13 of the Federal Constitution.
- I (iii) That the DGI decision is stayed pending the determination of this application.

- (iv) Further and/or in the alternative, that all proceedings filed under Shah Alam High Court Bankruptcy Case No: 29-3142-1999 be stayed pending the determination of this application. A
- (v) That the applicant be permitted to file further affidavits as the applicants consider necessary for the purposes of the substantive judicial review proceedings herein. B
- (vi) Costs of and incidental to this application be costs in the cause.
- (vii) Any further and/or other order that this court deems fit and/or otherwise deems appropriate. C

Background Facts

[2] The applicants were amongst the 13 creditors who filed their proof of debts against Lim Tee Keong (LTK) for the sum of RM10,168,257.25 and RM384,246.02 respectively. LTK was the eldest son of the late Tan Sri Lim Goh Tong (Tan Sri LGT) ie, the founder of the Genting Group. LTK was previously adjudicated a bankrupt on 18 February 2003. D

[3] The total proof of debts filed against LTK amounted to RM208,734,749.45 whilst the credit balance of LTK's estate at the time was RM839,633.73. On 31 March 2004, 1 June 2004 and 19 August 2004, the first respondent conducted a public examination of LTK based on his statement of affairs. E

[4] Subsequently, on 11 March 2013, LTK filed an application for an order for discharge pursuant to s. 33 of the Act (the first discharge application) which was filed approximately ten years after he was adjudged bankrupt. The first discharge application was dismissed by the Deputy of Registrar of the High Court on 5 July 2013. LTK then filed an appeal to the Judge in Chambers on 10 May 2014 but the appeal was also dismissed by the court. The factual findings of the High Court are as follows: F

- (i) LTK had committed an offence under the Act for filing his statement of affairs outside the 21 days mandated by s. 16(2)(b) of the Act. No evidence was tendered by either LTK or the Director General of Insolvency (DGI/first respondent) that an extension of time had been duly granted or that there was a reasonable excuse for this delay. G
- (ii) The proposed dividend of 0.552% was manifestly below the requirement of 50% of dividends. LTK had failed to show that the fact that his assets only managed to bring 0.552% had arisen from circumstances which he cannot justly be held blameworthy. H
- (iii) There were discrepancies in the first respondent's report: I
- (a) The first respondent's report did not record that LTK had failed to file the statement of affairs within 21 days without reasonable excuse; and

- A (b) the first respondent's report did not show that it was based on a complete investigation into the past conduct of the affairs of LTK.
- (iv) There was no proper investigation done on the conduct and affairs of LTK based on the first respondent's report. In particular, as to whether LTK had assets hidden under the name of his wife and three children.
- B Without said report, it is conceivable that LTK, who managed to borrow more than RM208 billion, had assets of not even 1% of the total amount of his unsecured liabilities.
- C [5] LTK passed away on 14 April 2014, prior to the appeal to the Court of Appeal. On 30 April 2014, the Court of Appeal allowed LTK's younger brother namely Datuk Lim Chee Wah (LCW) to carry on the appeal in place of LTK. LTK subsequently appealed to the Court of Appeal against the High Court's decision but on 4 August 2014, the Court of Appeal upheld the decision of the High Court. Subsequently, on 14 April 2016, the Federal Court dismissed LTK's application for leave to appeal. Therefore, the findings and decisions of the High Court, Court of Appeal and Federal Court remained valid and binding.
- D [6] However, despite the clear findings by the court admonishing the first respondent's efforts in investigating the assets of LTK, the first respondent failed and/or refused to take any further steps to investigate the affairs of LTK.
- E [7] Prior to LTK's application for leave to the Federal Court, it came to light that an action had been commenced at the Kuala Lumpur High Court *vide* Suit No. WA-22NCvC-101-02-2016 (Suit 101) by LTK's sons against the executors of LTK's last will and testament dated 11 March 2014 (LTK last will) which had never previously been disclosed to the creditors of LTK. The following facts *inter alia* were disclosed in Suit 101:
- F (i) Tan Sri LGT had established a trust for each of his sons and their descendants. For LTK, it was known as the LTK Trust named after LTK.
- G (ii) Pursuant to Tan Sri LGT's last will dated 17 October 2002, he had bequeathed 1/3 of his Malaysian residual assets to the LTK Trust, which is very substantial, given his wealth.
- H [8] Therefore, the applicants accordingly had reasons to suspect that LTK had further assets which had not been disclosed to or investigated by the first respondent. It is also significant that LTK's children, Marie Lim Seok Leng and Benjamin Lim Keong Hoe are seeking, *inter alia*, the production of the LTK Trust and/or account of the trust in Originating Summons No. WA-24NCvC-111-01-2016 and WA-24NCvC-1489-10-2014 which suggest that there could be assets of LTK that may be available to meet the debts of his creditors.
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[9] Premised on the foregoing and given the inaction by the first respondent, the applicants filed the several *ex parte* applications under r. 53 of the Bankruptcy Rules 1969 and s. 31 of the Act (s. 31 applications/asset discovery proceedings) to administer interrogatories and/or obtain discovery of documents against the examinees who would likely have information regarding LTK's undisclosed assets. The applicants' s. 31 applications were allowed by the Deputy Registrar and the examinees were ordered to be examined before the court. Pursuant to the said orders, the examinees were subsequently summoned by the High Court for examination.

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[10] Subsequently, eight out of the proposed examinees filed their respective applications to set aside the said s. 31 orders and summons but were dismissed by the Deputy Registrar. However, the said proceedings have yet to be fully and finally disposed of and are currently pending determination before the High Court, Court of Appeal and Federal Court.

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[11] The applicants claimed that the first respondent was fully aware of all the above asset discovery proceedings and/or had been present in court during these proceedings. Despite the above, on 25 January 2018, the first respondent issued a notice pursuant to r. 194 of the Insolvency Rules 2017 to the creditors of LTK informing them that the first respondent intended to discharge LTK and they were to file any objections within 21 days if they intended to object to the discharge. The notice however contradictorily further stipulated that no objections could be made pursuant to s. 33B(2A) of the Act.

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[12] Following that, on 14 February 2018, the applicants duly filed their notice of creditors objection under s. 33B of the Act *inter alia* setting out their grounds for resisting the discharge. However, on or around 4 June 2018, the applicants received the DGI decision *vide* a letter dated 18 May 2018 notifying that the first respondent has exercised his discretion to allow a discharge of bankruptcy *vide* the certificate of Director General of Insolvency pursuant to s. 33A of the Act.

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[13] The applicants then wrote to the first respondent on 3 July 2018 requesting the certificate of discharge pursuant to s. 35(4) of the Act and clarification of any assets and/or properties of LTK which remain vested in the first respondent before and/or after the discharge and particulars of the same if any. Nevertheless, the aforesaid letter dated 3 July 2018 has not been responded to by the first respondent as to date.

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[14] Aggrieved by the first respondent's decision, hence, the applicants filed this present judicial review application to challenge the said DGI decision amongst others on the following grounds:

- (i) The first respondent had acted illegally and unreasonably as the first respondent did not have the powers and/or jurisdiction to allow the discharge under s. 33A of the Act.

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- A (ii) The first respondent had acted irrationally, unreasonably and disproportionately in that the first respondent abused his discretion by failing to take into account the relevant considerations namely the courts' findings and determinations in the first discharge application and the courts' findings and determinations in the asset discovery proceedings.
- B (iii) The first respondent had acted irrationally, unreasonably, disproportionately, in breach of natural justice and procedural fairness in abusing his discretion by taking account irrelevant considerations in invoking s. 33A of the Act and consequently applying s. 33B(2A) of the Act in preventing the applicants from objecting to LTK's discharge from bankruptcy.
- C (iv) In breach of arts. 5 and/or 8 and/or 10 and/or 13 of the Federal Constitution, natural justice, procedural fairness and reasonableness.
- D [15] The first and second respondents however opposed to this judicial review application amongst others on the following grounds:
- (i) The first respondent has complied with the procedures laid down under s. 33A and s. 33B(2A)(c) of the Act to discharge the deceased from bankrupt.
- E (ii) Based on the provision under s. 33A of the Act, the first respondent has a discretionary power to discharge a bankrupt if the bankrupt has been in a state of bankruptcy more than five years from the date he/she has been adjudged as a bankrupt.
- F (iii) According to s. 33B of the Act, prior to the issuing of a certificate of discharge in pursuant to s. 33A of the Act, the first respondent must issues a notice of intention to discharge a bankrupt to all the creditors which have filed their proof of debt.
- G (iv) Within 21 days from the receipt of such notice, the creditors which intend to object the said notice of intention, must submit a notice of objection and state their reason for such objection for not discharging a bankrupt. Nevertheless, for a bankrupt who falls under the category as stated in s. 33B(2A) of the Act, no objection can be submitted to the DGI by the creditors.
- H (v) Based on the provisions above, the first and second respondents submitted that the first respondent has complied with all the procedures laid down under s. 33A and s. 33B to discharge the said deceased from bankrupt.
- I (vi) Since the deceased passed away on 1 April 2014, the first respondent has the power to discharge the deceased from bankrupt based on s. 33B(2A)(c) of the Act without objection from the creditors.

- (vii) The letter dated 18 May 2018 issued by the first respondent was actually a letter to inform that the first respondent is intended to discharge the deceased pursuant to s. 33B(2A)(c) of the Act on the ground that the deceased has passed away on 1 April 2014. A
- (viii) However, the first respondent has postponed his intention to discharge the deceased from bankrupt as there is public examination that is still on going at Shah Alam High Court and the recent bankruptcy search on the deceased has shown that the deceased is still a bankrupt and yet to be discharged. Further, there is no discharge certificate has been issued by the first respondent on the deceased. B
- (ix) Thus, the applicants' application for judicial review herein is premature since the deceased is still a bankrupt and yet to be discharged by the first respondent. C
- (x) There are statutory remedies provided under the Act for the applicants to object the first respondent's decision whereby alternatively, if the first respondent decided to discharge a bankrupt from bankruptcy, the creditors who object such decision may appeal against that decision as provided under s. 86 of the Act. For those creditors who have filed their proof of debt and objecting the DGI's decision to discharge a bankrupt, they must file an appeal to the court against that decision. D
- (xi) Therefore, it is crystal clear that the application for judicial review cannot be applied as there is specific provision under the Act which provides alternative remedy to object the DGI's decision to discharge the deceased (which is denied). Thus, in such circumstances, the applicants should file an appeal instead of filing this application for judicial review as there is specific provision laid down under the said Act. E
- (xii) In any event, since there is no decision or discharge certificate has been issued on the deceased by the first respondent, hence the applicants' application herein is a premature application. F
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Finding And Decision

[16] It is trite law that in judicial review application, the decision of inferior tribunal may be reviewed by the court on the grounds of "illegality", "irrationality" and "procedural impropriety" which permit this court to scrutinise the decision not only for process but also for substance of the case as illustrated by the Federal Court in *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147, at pp. 171 to 172, FC Edgar Joseph Jr FCJ in his judgment had said this: H

In allowing the appeal on the grounds aforesaid, it is self-evident that we had reviewed the award of the Industrial Court for substance as well as process. First of all, I should like to examine the legal basis upon which we had done so, and it is this topic which I shall now address, before I I

A turn to consider the question of whether we have powers to grant remedies by way of consequential orders, referred to in the second paragraph of this judgment.

B It is often said that judicial review is concerned not with the decision but the decision-making process. (See, e.g. *Chief Constable of North Wales v. Evans* [1982] 1 WLR 1155). This proposition, at full face value, may well convey the impression that the jurisdiction of the Courts in judicial review proceedings is confined to cases where the aggrieved party has not received fair treatment by the authority to which he has been subjected. Put differently, in the words of Lord Diplock in *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374, where the impugned decision is flawed on the ground of *procedural impropriety*.

C But, Lord Diplock's other grounds for impugning a decision susceptible to judicial review make it abundantly clear *that such a decision is also open to challenge on grounds of 'illegality' and 'irrationality' and, in practice, this permits the Courts to scrutinise such decisions not only for process, but also for substance.*
D (emphasis added)

[17] The court also refers to the case of *Menteri Dalam Negeri & Ors v. Titular Roman Catholic Archbishop Of Kuala Lumpur* [2013] 8 CLJ 890 wherein the Court of Appeal held that:

E [69] ... the decision maker must consider matters required to be considered and disregard irrelevant collateral matters and the decision must be within the perimeters of the statutory powers given to the decision maker on the matter. It goes without saying therefore if the decision is made in compliance with these principles and requirements such decision cannot be said to be unreasonable and is unassailable. *But if the exercise of the discretion is made in contravention of any law or that the decision maker has taken*
F *into consideration irrelevant matters or that the decision maker has acted in excess of powers conferred upon him in respect of the matter which he decided or that the decision militates against the object of the statute, then the court can intervene and strike down the decision as unreasonable and unlawful.* (emphasis added)

G [18] On or about 4 June 2018, the applicants received the DGI decision *vide* letter dated 18 May 2018 notifying that the first respondent has exercised his discretion to allow a discharge of bankruptcy *vide* the certificate of Director General of Insolvency pursuant to s. 33A of the Insolvency Act 1967. The language used by the first respondent in communicating the DGI decision was unequivocal. The extract is set out below:

H 2.Untuk makluman tuan, **Jabatan ini telah memutuskan akan melepaskan bankrap daripada kebangkrapan** melalui Pelepasan Sijil Ketua Pengarah Insolvency di bawah Seksyen 33A (Akta 360) Akta Insolvency 1967 kerana bankrap telah meninggal dunia pada 1.4.2014. Seksyen tersebut perlu dibaca bersama subseksyen 33B(2A) Akta Insolvency 1967 yang menghalang pemiutang mengemukakan bantahan terhadap keputusan Ketua Pengarah Insolvency (KPI) untuk melepaskan bankrap daripada kebangkrapan. Peruntukan undang-undang tersebut adalah seperti berikut.
I (emphasis added)

[19] The applicants subsequently written to the first respondent on 3 July 2018 to request for the following: A

- (i) The certificate of discharge pursuant to s. 35(4) of the Insolvency Act 1967; and
- (ii) Clarification of any assets and/or properties of LTK which remain vested in the first respondent before and/or after the discharge, and particulars of the same. B

To date, the aforesaid letter dated 3 July 2018 has not been responded to by the first and second respondents.

[20] The applicants are aggrieved by the DGI decision as the first respondent had unilaterally discharged LTK from bankruptcy notwithstanding the courts' decisions refusing discharge and/or the pendency of the asset discovery proceedings and the courts' findings in the above proceedings. C

[21] The first and second respondents in their submissions raised two issues which are as follows: D

- (i) The applicants are barred because of the availability of alternative/ statutory remedy against the DGI decision *vide* s. 86 of the Insolvency Act 1967; and E
- (ii) The DGI decision is in accordance to proper procedure.

Issue I

[22] It is the first and second respondents' contention that the applicants ought to rely on the appeal mechanism contained under s. 86 to appeal against the DGI decision made pursuant to s. 33A. For easy reference, ss. 33A, 33B(2A) and 86 are extracted as below: F

Section 33A;

Discharge of bankrupt by Certificate of Director General of Insolvency

33A. (1) The Director General of Insolvency may, in his discretion but subject to section 33B, issue a certificate discharging a bankrupt from bankruptcy. G

(2) The Director General of Insolvency shall not issue a certificate discharging a bankrupt from bankruptcy under subsection (1) unless a period of five years has lapsed since the date of the bankruptcy order. H

(3) Notice of every discharge under subsection (1) shall be given by the Director General of Insolvency to the Registrar and the Director General of Insolvency shall advertise the notice in a local newspaper as prescribed.

(4) The Director General of Insolvency shall, upon the application of any interested person, issue a copy of the certificate of discharge to the applicant upon payment of the prescribed fee. I

A Section 33B(2A)

Objection by creditor to discharge of bankrupt under section 33A

33B. (1) Before issuing a certificate of discharge under section 33A, the Director General of Insolvency shall serve on each creditor who has filed a proof of debt a notice of his intention to issue the certificate.

B (2) A creditor who has been served with a notice under subsection (1) and who wishes to object to the issuance of a certificate discharging the bankrupt shall, within twenty-one days from the date of service of the notice, furnish a notice of the objection stating the grounds of his objection.

C (2A) Notwithstanding subsection (2), no objection shall be made against:

(a) a bankrupt who was adjudged bankrupt by reason of him being a social guarantor;

(b) a bankrupt who is registered as a person with disability under the Persons with Disabilities Act 2008 [Act 685];

D (c) **a deceased bankrupt**; and

(d) a bankrupt suffering from a serious illness certified by a Government Medical Officer.

E (3) A creditor who does not furnish a notice of his objection and the grounds of his objection in accordance with subsection (2) shall be deemed to have no objection to the discharge.

(4) **A creditor** who has furnished a notice of his objection and the grounds of his objection in accordance with subsection (2) may, within twenty-one days of being informed by the Director Insolvency that his objection has been rejected, **make an application to the court for an order prohibiting the Director General of Insolvency from issuing a certificate of discharge.**

F (5) Every application under subsection (4) shall be served on the Director General of Insolvency and on the bankrupt and the court shall hear the Director General of Insolvency and the bankrupt before making an order on the application.

G (6) On an application made under subsection (4), the court may, if it thinks it just and expedient:

(a) dismiss the application;

H (b) make an order that for a period not exceeding two years a certificate of discharge shall not be issued by the Director General of Insolvency.

Section 86

Appeal to court against Director General of Insolvency

I 86. If the bankrupt or any of the creditors or any other person is aggrieved by any act or decision of the Director General of Insolvency, he may apply to the court, and the court may confirm, reverse or modify the act or decision complained of and make such order in the premises as it thinks just. (emphasis added)

[23] From a perusal of s. 33B and s. 86 above, it is clear that s. 33B is a specific provision applicable to challenge the first respondent's decision whereas s. 86 is a residual position and as the general provision, is not applicable as far as s. 33B is concerned. The maxim of *generalia specialibus non derogant* is applicable. Section 33B(2A)(c) specifically bars creditors from objecting the DGI decision discharging a bankrupt who is deceased. By filing an appeal against the DGI decision under s. 86, is inherently contradictory to s. 33B.

[24] The availability of an alternative remedy is not a bar to judicial review provided that the applicants are able to demonstrate illegality or unlawful treatment in the DGI decision. In such circumstances, it would be wrong to insist on exhaustion of an alternative remedy. In *Metacorp Development v. Ketua Pengarah Hasil Dalam Negeri* [2011] 1 LNS 1002; [2011] 5 MLJ 447 the court at pp. 453 to 454 held that:

[8] It is clearly established by the Federal Court in the *Majlis Perbandaran Pulau Pinang* that an application for a judicial review is not barred by the non-exercise of its internal appeal procedure. As stated by Edgar Joseph Jr FCJ in that case, whilst in theory the court often been recited with incantation that alternative remedy must be exhausted, in practice the courts are often much kinder to an applicant with good case. Having analysed the various conflicting decisions of the English cases in that case the Federal Court states that generally, if an applicant can demonstrate illegality or unlawful treatment then it would be wrong to insist on exhaustion of local remedy. The Federal Court acknowledged that in certain cases such as tax cases, appeal procedure is provided under the statute but if the applicant can demonstrate excess or abuse of power or a breach of natural justice, judicial review would still be granted. Indeed in the present case where there exist special circumstances, the respondent is not immune from the process of judicial review. Similar principle was applied by the High Court in *Kim Thye Co v. Ketua Pengarah Jabatan Hasil Dalam Negeri, Kuala Lumpur* [1991] 3 CLJ 2507; [1991] 3 CLJ (Rep) 20, which was subsequently upheld by the Supreme Court on appeal.

Issue II

[25] The DGI decision in effect reversed the High Court's decision refusing to discharge LKT (first discharge application) which was upheld by the Court of Appeal and the Federal Court. Two grounds were raised in the grounds of judgment in the High Court and the Court of Appeal. First, there were express findings and strong criticism made against the first respondent for having failed to conduct sufficient investigation into the matter. The High Court stated the first respondent's report was incomplete as to whether LTK had hidden assets. The Court of Appeal was appalled by the first respondent's report which was described as simplistic, incomplete and defective. The two courts conclude that the first respondent should conduct further and more thorough investigations into the assets of LTK before a discharge could be considered.

A [26] Secondly, the Court of Appeal at the time of delivering its decision had taken into consideration that LTK was deceased and still refused to allow LTK to be discharged. Despite not having conducted any further investigations into the matter, the first respondent continuously sought to reconsider and discharge LTK pursuant to s. 33A read together with
B s. 33B(2A) of the Act as LTK is deceased.

[27] In light of, *inter alia*, the asset discovery proceedings and the courts' decision in the first discharge application, the first respondent had proceeded to make the DGI decision. After the commencement of judicial review proceedings, the first respondent then seeks to suspend his decision because
C of the existence of the asset discovery proceedings. The first respondent by his language acknowledges that a decision has been made and that he is now delaying the implementation of the discharge. In the first respondent's letter dated 7 December 2018, the first respondent states this:

D Jabatan ini memutuskan untuk menangguhkan tindakan pelepasan di bawah Seksyen 33A Akta Insolvency 1967 terhadap bankrap memandangkan terdapat permohonan pemeriksaan awam oleh pemiutang terhadap trustee fund Tee Keong Family di Mahkamah Tinggi Shah Alam.

The DGI decision and the first respondent subsequent reasons for suspending the decision plainly defies logic and afterthought as the first respondent was
E well aware of the asset discovery proceedings prior to making the DGI decision.

[28] The first respondent's position that LTK is now deceased does not warrant a reconsideration of the discharge given this factor was expressly considered by the Court of Appeal in their grounds of judgment. As rightly
F submitted by the applicants that the first respondent has no power and/or jurisdiction under s. 33A to reverse a court's decision when discharging a bankrupt namely LTK and subsequently suspend the said decision.

[29] The first and second respondents contention that there was no certificate of discharge issued by the first respondent and therefore this application is premature and should not be allowed is non-issue as the first
G respondent had in the first place made a decision to discharge the deceased under s. 33B(2A)(e) of the Act.

[30] The conduct of the first respondent is irrational as in effect, by
H unilaterally discharging LTK, the first respondent invalidated the findings of the High Court and Court of Appeal directing the first respondent to conduct further investigations into the assets of LTK.

[31] The Court of Appeal in *Lim Hun Swee v. Malaysia British Assurance Bhd & Ors And Others Appeals* [2010] 8 CLJ 680; [2011] 2 MLJ 218 held that it
I is trite that the DGI has the duty to properly and thoroughly investigate the conduct and affairs of a bankrupt in any application for a discharge of

bankruptcy. Therefore, the court is of the view that it would be wrong for the first respondent to use s. 33B(2A)(e) as an excuse to discharge LTK without complying the court's order.

Conclusion

[32] After having considered the applicants' application and submission of the parties, it is the finding of this court that the mere fact that a bankrupt is deceased does not allow for an automatic discharge under s. 33A read together with s. 33B(2A)(e) of the Act because such position is not provided for under s. 33C of the Act which sets out the positions on automatic discharge. Therefore, it still falls within s. 33A that requires the first respondent to still exercise his discretion in taking into account all relevant considerations. Most pertinently, s. 33A does not empower the first respondent to reconsider applications that have already been determined by the High Court *vide* an application under s. 33 of the Act.

[33] In conclusion, the court finds that the first respondent had acted illegally, irrationally and procedure impropriety in the DGI decision to discharge LTK under s. 33A of the Insolvency Act 1967. Hence, the court allowed the applicants' application with costs of RM5,000 subject to allocatur.

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